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IN THE

# Supreme Court of the United States

October Term, 1971
No. 70-117

CHARLES JOSEPH KASTIGAR and MICHAEL GOREAN STEWART,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondents.*

**Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## Petition of Charles Joseph Kastigar and Michael Gorean Stewart, for Rehearing.

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## Petition of Charles Joseph Kastigar and Michael Gorean Stewart, for Rehearing.

*To the Supreme Court of the United States and the Honorable Justices Thereof:*

Come now Petitioners Charles Joseph Kastigar and Michael Gorean Stewart, Petitioners-Appellants herein, by and through their undersigned counsel, who present this, their Petition for Rehearing, and in support thereof respectfully state to the Court:

I.

On May 22, 1972, the Court entered an Opinion in the within cause, delivered by Mr. Justice Powell, in which cause Mr. Justice Douglas and Mr. Justice Marshall dissented, filing separate dissenting Opinions.

II.

Counsel for Petitioners herein respectfully submit that the Decision rendered in the above cause (1) is erroneous in that the precedents upon which it relies actually stand for the proposition advanced by Petitioners, namely that *transactional* immunity is required by and thus coterminous with the contours of the Fifth Amendment to the United States Constitution and (2) that this cause was prosecuted in bad faith by Respondents who were concomitantly prosecuting Petitioners herein for the very offenses for which they sought Petitioners' testimony, and that the cause herein was mooted prior to the date on which the Opinion was delivered. For all of the above reasons Counsel respectfully suggest that the Opinion herein be withdrawn and that this Court find the causes herein mooted, or enter a judgment reversing the decisions of the courts below.

III.

**A. Concern Solely With "Evidentiary" Use Is Erroneous.**

Mr. Justice Powell's Opinion demonstrates why the decision of this Honorable Court is erroneous. At page 18 of the slip opinion herein the Majority Opinion sets forth what it believes to be the main concern, indeed, the sole concern, of the Fifth Amendment in this regard, and thus the viability of the *use* immunity provisions of 18 U.S.C. §§ 6002-6003. The Opinion reads:

> Immunity from the use of compelled testimony and evidence derived directly therefrom affords [the] protection [mandated by the Fifth Amendment's privilege against self-incrimination].

The Court's Opinion, and thus the Court's concern, focuses solely on the evidentiary problems of the *use* immunity statute.

The Court arrives at this concern by mis-applying *Murphy v. Waterfront Comm'n.*, 378 U.S. 52 (1964), and by taking the rather expansive concepts of *Murphy*, which there necessarily dealt with evidentiary matters, and confining them beyond the context of that case. The Court cited the following from *Murphy*:

> [A] state witness cannot be compelled to give testimony . . . incriminating under federal law unless the . . . testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. Opinion at p. 16.

By interpreting "use" to require an evidentiary *setting*, and then by ignoring the non-evidentiary "uses" to which such testimony can be put, or to the advantages which inure in compelling damaging evidence from a witness and later trying him for the offense for which he has been required to testify, the Court has done away with years of common-law precedent and dozens of this Court's own Opinions.

This Court ignores, or attempts to distinguish as *dicta* its holding in *Counselman v. Hitchcock*, 142 U.S. 547 (1892) and would have us think, eighty years after *Counselman* became settled, respected precedent, that the Supreme Court's interpretation in 1892 of the Fifth Amendment could be considered a zealous and inarticulate exercise. There this Court wrote

> a statutory enactment [compelling testimony], to be valid, must afford absolute immunity against future prosecution for the offense to which the question [or interrogation] relates.

[142 U.S. at 586]. To assert now that the *Counselman* Court meant merely that a statute which did not provide *use* immunity was void turns the truth on its head. The Court was then concerned with whether any kind of immunity could displace the privilege against self-incrimination. The argument was not as this Court would have us believe, *use* immunity versus *transactional* immunity.[1] Rather it is clear from *Counselman* that the concern was with whether even transactional immunity was constitutionally sufficient. This Court's novel interpretation of *Counselman* thus turns the opinion on its side and from that angle discusses the factors which underpinned the holding. It is, we submit, this conceptual inaccuracy which causes the Court to shake 80 years of settled precedent.

Further, there are a number of other non-"evidentiary" benefits derived by the prosecution if it is permitted free-wheeling discovery and subsequent prosecution of unwilling witnesses under *use* immunity statutes:

1. The *psychological pressure* of previous testimony in itself may prove so great as to force a previously compelled witness to abandon his right to trial and confrontation of the witnesses against him; such a use of psychological pressure has been severely condemned by this Court often. *See, e.g., Miranda v. Arizona,* 384 U.S. 436 (1965).

2. Because the compelled witness may wish to insure no use whatsoever will be made of his testimony, and because as this Court pointed out in the Opinion

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[1]Indeed, by claiming the *Counselman* holding was *dictum* the Court necessarily requires us to believe that at issue was a *limited* use immunity statute. (See Opinion at pp. 13-14.)

herein the kinds of cases in which immunity will be granted necessarily involve multiple defendants or co-conspirators (Opinion at p. 6), the compelled witness may as a matter of course cast *as wide an incriminating net as possible,* thus tainting the reliability of his own testimony while facilitating the Government's efforts in convicting the compelled witness' alleged confederates with suspect testimony.

3. Again, because there will usually be a number of indictments brought when "valuable" testimony is elicited from an unwilling witness, the publicity attendant with the handing down of *other* indictments, which may publicize the testimony of the compelled witness, by stating his role and the information upon which the other indictments were issued, will serve to deny the unwilling witness a fair and impartial trial; and because as this Court's Opinion so rightly pointed out the *use* immunity statute will probably be used in cases of great public importance, concern and interest, (see p. 6) this danger is very real. *Use* immunity and a series of subsequent indictments really permits the insidious invasion into the compelled witness' case-in-chief of testimony publicized beyond the sterile court room setting.

4. The *use* immunity statute further denies due process wherein it permits the Government's massive resources to focus in on the compelled witness and insures that a fire will be found where there may be smoke. Given the vast funds available to the Government and the huge investigatory network at its command, the *use* immunity testimony permits the Government to bring a disproportionate amount of its resources to bear against the unwilling witness. This Court's Opinion totally mis-treats this issue, confusing

"evidentiary" use with "investigatory use" (Opinion at p. 20). There simply is no way to determine what advantages inured to the Government in the compelled testimony unless the Government is required to prove, at every step of its investigation, that the resources it brought to bear, the modes of investigation, and the theories of its case were not in some way advantaged or aided by the "lead" of the compelled testimony (*Cf. Wong Sun v. United States,* 371 U.S. 471 (1963)). The Court's reliance upon the "burden of proof" placed upon the Government as the prophylactic device to wash away the evils here-mentioned is a slender reed indeed. As to what aspects of its case must the Government prove it was not advantaged? What must the Government bring forward to discharge its burden? If history is any guide, then as in the wiretap and voluntary confession arenas the Government will attempt to discharge its burden with as little hard evidence as it can get away with, probably a mere affidavit of some middle-level investigator that this case was just the usual kind of case. And then the burden will shift, not imperceptibly but onerously, upon the Defendant, to try to prove just in which of a thousand ways the Government was (not might have been) advantaged.

The concern of the Courts has never been placed solely upon "evidentiary use". Perhaps not often articulated, the subtle pressures which surround testimonial compulsion and subsequent prosecution for the transaction involved have led this Court to require in its settled precedent full, plenary transactional immunity.

The Court's efforts herein to create from clear, settled precedent a flotilla of ambiguities and to steer a tendentious course through the fleet, shipwrecks the Fifth Amendment.

**B. This Cause Was Prosecuted by the Government in Bad Faith Since the Government Was Also Prosecuting Petitioners Herein for the Very Transactions for Which "Use" Immunity Was Offered.**

A very clear example of one of the abuses of "use" immunity has occurred in the cases at Bar. After attempting to elicit incriminating information from the Petitioners herein the Government sought to insure that Petitioners would be ensnared in a web, even if not of their own making.

One very real danger of "use" immunity statutes is that they may tend to compound the punishment for single offenses by pyramiding contempt sentences upon the possible sanctions for violating the substantive law under investigation. Further combined with the possible prosecution also available to the Government for perjury and the rendition of false statements (see Opinion at p. 8) the *use* immunity statute permits the Government, which already has inherent prosecutorial and resource advantages over defendants yet another device to ensnare and entrap and to exert powerful pressures. In these very cases the Government decided soon after the Petitioners herein refused to testify that it would prosecute them no matter what their performance before the Grand Jury. From what seems to be information wholly available to the Government on February

11, 1971 (the date on which each of the Petitioners herein refused to testify) the Government thereafter sought an indictment against each of the Petitioners herein. On July 12, 1971 Petitioner Kastigar was indicted by the Grand Jury on a one-count conspiracy charge. (See Indictment No. 8462-CD appended hereto as Exhibit A to Petition for Rehearing.) Petitioner Stewart was subsequently indicted on January 31, 1972 on a two-count indictment. (See Indictment No. 9577 appended hereto as Exhibit B.)

Petitioner Kastigar was subsequently adjudged Guilty on November 11, 1971. Petitioner Stewart was subsequently adjudged Not Guilty on Count one on April 4, 1972 and Not Guilty on Count two on May 1, 1972. Despite the fact that the trials and judgments occurred prior to the rendition of the Opinion herein, and that the Government's need for the testimony which may have existed on February 11, 1971 was no longer necessary, (the trial of the alleged co-conspirator, Dr. Bernard Bender, having also ended prior to the rendition of the judgment herein) and that the Grand Jury was no longer sitting, yet the Government pressed forward with the defense of this action which was then probably moot.

## IV.

## Conclusion.

As this Court said in *Ullmann v. United States,* 350 U.S. 422, 438 (1956), transactional immunity statutes have "become a part of our constitutional fabric."[2] The decision herein weaves a discordant and disrup-

[2]The use of this phrase by the Majority herein to support the proposition that *use* immunity is part of our constitutional fabric is, with all due respect, disingenuous and intellectually dishonest.

tive thread through the protective cloth that is the Fifth Amendment and weakens and stresses the Great Amendment's very seams at a cost much greater than any benefits which could possibly inure to the Government. For all of the above reasons counsel for Petitioners respectfully suggest that the Court withdraw its Opinion herein and reconsider the issues here at Bar.

Respectfully submitted,

HUGH R. MANES, ESQ.,
WILLIAM G. SMITH, ESQ.,
By HUGH R. MANES, ESQ.,
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*Of Counsel:*

MARGOLIS, MCTERNAN, SMITH,
SCOPE & HERRING,
*Attorneys for Petitioner Stewart.*

**Verification of Attorney.**

I, Hugh R. Manes, one of the attorneys herein, do hereby verify that this Petition for Rehearing is presented in Good Faith and not for purposes of delay.

Dated: June 15, 1972.

Hugh R. Manes

HUGH R. MANES

## EXHIBIT A.

**Indictment [50 U.S.C. App. §462—Military Selective Service Act of 1967: Conspiracy].**

United States District Court, Central District of California, September 1970 Grand Jury.

United States of America, Plaintiff, v. Charles Joseph Kastigar, Defendant. No. 8462 CD.

FILED: July 12, 1971.

The Grand Jury charges:

[50 U.S.C. App. 462]

Commencing about May 20, 1970 and continuing until the return of this indictment, in Los Angeles County, within the Central District of California, defendant CHARLES JOSEPH KASTIGAR and unindicted co-conspirator Bernard Bender agreed, confederated and conspired together to commit offenses against the United States as follows:

(a) to make and cause the making of false statements bearing upon the selective service classification of defendant KASTIGAR,

(b) to cause the making of a false, improper and incorrect selective service classification and physical examination of defendant KASTIGAR, and

(c) to evade service by defendant KASTIGAR in the armed forces of the United States.

The objects of the conspiracy would be accomplished as follows: Defendant KASTIGAR, desiring to avoid service in the armed forces of the United States would be referred to and contact unindicted co-conspirator Bernard Bender, who was then engaged in the prac-

tice of dentistry. Co-conspirator Bender would agree with defendant KASTIGAR to fit defendant KASTIGAR with orthodontic appliances. Shortly before defendant KASTIGAR was scheduled to report to the Armed Forces Examination and Entrance Station, co-conspirator Bender would place orthodontic appliances on defendant KASTIGAR'S teeth. Co-conspirator Bender would also furnish defendant KASTIGAR a letter indicating that defendant was a genuine dental patient then undergoing legitimate and active orthodontic treatment by co-conspirator Bender. Thereafter, defendant KASTIGAR would report to the Armed Forces Examination and Entrance Station with the orthodontic appliances on his teeth and with the letter in his possession, and would be rejected for military service in consequence thereof. Shortly thereafter, defendant KASTIGAR would return to the office of co-conspirator Bender where co-conspirator Bender would remove the orthodontic appliances from defendant KASTIGAR'S teeth. Co-conspirator Bender and defendant KASTIGAR would make arrangements to replace the orthodontic appliances on defendant KASTIGAR'S teeth temporarily in the event that defendant KASTIGAR should be recalled for future armed forces physical examination or induction;

All in violation of 50 U.S.C. App. 462.

A TRUE BILL
[Illegible]
Foreman

/s/ Robert L. Meyer
ROBERT L. MEYER
United States Attorney

## EXHIBIT B.

**Indictment [18 U.S.C. §371: Conspiracy to Violate Military Selective Service Act of 1967; 50 U.S.C. App. §462: Military Selective Service Act of 1967; Failure to Report Change in Physical Condition].**

United States District Court, for the Central District of California, September 1971 Grand Jury.

United States of America, Plaintiff, v. Michael Gorean Stewart, Defendant. No. 9577 CD.

The Grand Jury charges:

COUNT ONE

[18 U.S.C. §371]

Commencing prior to May 27, 1970, and continuing to on or about July 1, 1971, in Los Angeles County, within the Central District of California, defendant, MICHAEL GOREAN STEWART, and various other unindicted co-conspirators, including Dr. Bernard Bender, and other persons known and unknown to the Grand Jury, agreed, confederated, and conspired together to commit one or more of the following offenses against the United States of America.

a. Knowingly and wilfully cause the defendant, MICHAEL GOREAN STEWART, to evade service in the armed forces of the United States, in violation of Title 50, United States Code, Appendix, Section 462.

b. Knowingly cause the defendant, MICHAEL GOREAN STEWART, to undergo a false, improper, and incorrect physical examination at the Armed Forces Entrance and Examining Station, in violation of Title 50, United States Code, Appendix, Section 462.

c. Knowingly cause to be made a false, improper, and incorrect classification of defendant, MICHAEL

GOREAN STEWART, by Local Board No. 121, in violation of Title 50, United States Code, Appendix, Section 462.

d. Knowingly cause the defendant, MICHAEL GOREAN STEWART, to fail and neglect to inform his local board of a fact which might result in his being placed in a different classification, in violation of Title 50, United States Code, Appendix, Section 462.

The objects of the conspiracy were to be accomplished as follows:

Selective Service registrants, including the defendant, MICHAEL GOREAN STEWART, and other unindicted co-conspirators, would contact Dr. Bernard Bender, a dentist practicing in Canoga Park, California, to have orthodontic appliances placed on their teeth for the purpose of falsely representing to the Selective Service System that they would be undergoing active orthodontic treatment. Dr. Bender would ascertain the selective service status of the registrants, including that of the defendant, MICHAEL GOREAN STEWART. Impressions of the registrants' teeth would then be taken so that orthodontic bands could be made before the registrants needed them for draft evasion purposes.

Shortly before each registrant was scheduled to report for induction at the Armed Forces Examination and Entrance Station, Dr. Bernard Bender would place orthodontic appliances on the registrants' teeth, including defendant, MICHAEL GOREAN STEWART. The registrants would then report to the Armed Forces Examination and Entrance Station with the orthodontic appliances on their teeth. At that time the registrants would falsely represent that they were undergoing active orthodontic treatment which would continue for a

considerable period of time in the future. As a consequence of the representation, the registrants would be found disqualified from Military service and would be classified 1-Y as unfit for service for a period of time. Shortly after this disqualification, and without any notification by anyone to selective service or the Armed Forces Entrance and Examination Station, either Dr. Bernard Bender or the registrant would remove the orthodontic appliances from the registrant's teeth.

To effect one or more of the objects of the conspiracy, defendant, MICHAEL GOREAN STEWART, and his unindicted co-conspirators, including Dr. Bernard Bender, committed various overt acts in the Central District of California, and elsewhere, including the following:

1. On or about May 20, 1970, the defendant, MICHAEL GOREAN STEWART, visited Dr. Bernard Bender and had impressions taken of his teeth for the making of orthodontic bands.

2. On or about September 8, 1970, the defendant, MICHAEL GOREAN STEWART, had the bands inserted in his mouth by Dr. Bender.

3. On September 15, 1970, the defendant, MICHAEL GOREAN STEWART, appeared for induction at the Armed Forces Entrance and Examination Station and represented that he had been undergoing active orthodontic treatment by Dr. Bernard Bender.

4. On various dates after September 15, 1970, the defendant, MICHAEL GOREAN STEWART, was seen without orthodontic appliances on his teeth, and the defendant did not advise his local board that his braces had been removed.

COUNT TWO

[50 U.S.C. App. §462]

Defendant, MICHAEL GOREAN STEWART, a person charged with the duty of carrying out provisions of the Military Selective Service Act of 1967, Title 50, United States Code, Appendix, Section 451-471, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 121, said Board being then and there duly created and acting, under the Selective Service System established by said Act, in Los Angeles County, within the Central District of California; and during the period commencing before December 11, 1970, to July 1, 1971, the defendant knowingly failed and neglected to perform a duty required of him under said Act and the regulations promulgated thereunder in that shortly before he reported for induction on September 15, 1970, defendant, MICHAEL GOREAN STEWART, had dental braces placed on his teeth; on September 15, 1970, he reported for induction and was found disqualified for induction because he then wore dental braces and claimed to be undergoing active orthodontic treatment; shortly afterward, he removed the dental braces from his teeth and knowingly failed and neglected to report to Local Board 121 the fact that he no longer wore braces and was not undergoing active orthodontic treatment, a fact regarding defendant's physical condition which might result in his being placed in a different classification.

A TRUE BILL
[Illegible]
Foreman

/s/ William D. Keller
WILLIAM D. KELLER
United States Attorney